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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-672

BURLINGTON NORTHERN INC., et al., *Appellants*,

v.

STERLING COLORADO BEEF COMPANY, *Appellee*.

On Appeal from the United States District Court for the District of Colorado

MOTION TO AFFIRM

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STATUTE:

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MOTION TO AFFIRM

Appellee moves the Court to affirm the judgment below on the ground that the question presented is so unsubstantial as to require no further argument.

QUESTION PRESENTED

Whether the decision of the court below is in conflict with the decision of this Court in *Great Northern Railway Co.* v. *Sullivan*, 294 U.S. 458 (1935).

STATEMENT OF THE CASE

This case began when appellee, The Sterling Colorado Beef Company ("Sterling"), filed a complaint with the Interstate Commerce Commission alleging that as to certain shipments to Chicago and points east, the appellant railroads had been charging Sterling unreasonably high rates in violation of, *inter alia,* section 1(5) of the Interstate Commerce Act. The gravamen of Sterling's complaint was that on rates to Chicago (which were also used on eastern shipments) the railroads had grouped Sterling with—that is, charged Sterling the same rate as—Sterling's more distant competitors located at Denver, Pueblo and Greeley, Colorado. The Commission ruled that this grouping of Sterling with its more distant competitors was, as alleged, unreasonable and ordered the railroads to publish Chicago rates for Sterling at a level 14 and 15 cents per cwt. below the rates charged to Sterling's more distant competitors. The Commission also ordered the railroads to pay Sterling reparations consisting of the difference between the illegal rate which had been charged and the legal rate that should have been charged, the latter as determined by the Commission in fixing Sterling's rate for future shipments. The Commission, however, limited its reparations order to shipments which terminated in Chicago, even though the illegal rate had also been used on east coast shipments as one factor in a so-called combination rate. This combination rate was simply the sum of (i) the illegal Chicago rate, and (ii) the local rate from Chicago to the east coast destination.

Sterling had argued before the Commission that the combination rate was necessarily unreasonable to the same extent as the Chicago rate, which the Commission had found to be unreasonably high. The Commission rejected this argument on the ground that Sterling's "evidence relates only to the factor to Chicago" rather than to the overall rate from Sterling to the destination (339 I.C.C. at 537). In support of this ruling, the Commission summarily cited its own decision in *United States* v. *Beaumont, S.L. & W. Ry. Co.,* 301 I.C.C. 231, 234 (1957), which, in turn, had relied exclusively on this Court's ruling in *Great Northern Railway Co.* v. *Sullivan,* 294 U.S. 458 (1935).

Sterling appealed this aspect of the decision to the district court, arguing that the Commission had misread *Great Northern* and reached an insupportable result. The district court agreed. This appeal followed.

ARGUMENT

The district court's decision is plainly correct. The *Great Northern* case involved rail shipments of lignite from Canadian mines to American markets. The shipments moved on a combination rate which was composed of two so-called proportional rates, one proportional being applicable to the Canadian part of the journey and the other proportional being applicable to the American part of the journey.[1] The plaintiff established that the American proportional (*i.e.,* the rate

[1] A proportional rate is a factor in a combination rate. However, a proportional rate may be used only as part of a combination rate—that is, on a shipment that moves beyond on the through rate. The combination rate assailed in this case did not consist of proportional rates, but of "local" rates—i.e., rates that, like proportional rates, may be used as part of a combination rate, but, unlike proportional rates, can be used independently of any trans-shipment. See *Central Vermont Railway, Inc.* v. *United States,* 182 F.Supp. 516, 518, n. 4 (D. Vt. 1960), *rev'd on other grounds,* 366 U.S. 272 (1961).

from the international boundary to American destinations) was unreasonable, but neither alleged nor sought to prove that the overall rate from origin to destination was unlawful. The shipper made no such claim with respect to the overall through rate because affirmative evidence in the case showed that the overall through rate was in fact reasonable. This was because the Canadian proportional was so depressed as to more than make up for the excess charge on the American proportional.[2] In these circumstances, the Commission made no finding with respect to the legality of the overall combination through rate.

[2] The evidence before the Commission showed that the rate on the Canadian proportional was much lower than the rate fixed by the Commission itself as reasonable on the American proportional, so much so that the overall rate was clearly reasonable. The Commission-approved rates for the American proportional are set forth in a table in the I.C.C. ruling in the case, *sub nom., Alberta Coal Sales Co.* v. *C. N. Rys.*, 142 I.C.C. 543, 547 (1928). These Commission-mandated rates are based on mileage, and the table contains prescribed rates for distances from 10 to 500 miles. By way of example, we may consider a shipment from the coal mines in Alberta (Canada) to a point 500 miles beyond the American border. The average distance from Alberta mines to the international boundary is 728 miles, and the average rate for this Canadian proportional was $3.70 (142 I.C.C. at 544). A reasonable rate from the American border to an American destination 500 miles from the border (228 miles less than the distance under the Canadian proportional) is, according to the I.C.C.'s findings, $3.95 (142 I.C.C. at 547). Thus, the rate on the Canadian proportional ($3.70 for 728 miles) was very significantly below the rate on the American proportional ($3.95 for 500 miles). In short, the Canadian rate was less for a much greater distance. It was, therefore, clear that the Canadian railroads published such low rates to the American border that, when combined with the rates south of the border, they produced reasonable through rates, even though rates south of the border, standing alone, had been unreasonable. Thus, said the Supreme Court, "here the [overall rates] were not excessive" (294 U.S. at 462).

Plaintiff nevertheless argued that it was entitled to reparations simply on the basis that the American proportional was unreasonably high, even though the overall through rate was reasonable. This Court disagreed, holding that the ultimate issue was the reasonableness of the overall rate, not simply of the American proportional. In rejecting the shipper's claim for reparations, the Supreme Court stated:

> [The shippers] *did not attack the combination* or allege aught against the Canadian Pacific proportional . . . [The Commission] made no finding concerning the reasonableness of the Canadian proportionals *or of the combination through rates. There being no claim or finding to the contrary, the charges collected on these shipments must be deemed to have been just and reasonable* [emphasis supplied] [294 U.S. at 461].

The Court went on to note that there was affirmative evidence to show that the combination rate as a whole was reasonable:

> Indeed, dissenting commissioners without opposition on the part of others, state that they [the overall charges collected on these shipments] are affirmatively shown to be reasonable [*Id.*].

The holding of the case is simply a rejection of the shipper's position, which the Court summarized as follows:

> Plaintiff seeks to recover the difference between the proportional established by the defendant and that found by the commission to be just and reasonable *notwithstanding its fuel was hauled from mines to the competitive field for a just and reasonable charge* [emphasis added] [294 U.S. at 463].

Great Northern simply held that in order to collect reparations, a shipper must allege and prove that the overall combination rate (when composed of two proportionals) is unreasonable. But the court clearly left open the question at issue here: whether, in an appropriate case, an assailed combination rate may be proved unreasonable by evidence directed toward one factor.[3]

The Commission interpreted the *Great Northern* decision in two subsequent cases. In the first (*Auburn Mills* v. *Chicago & A. R. Co.*, 222 I.C.C. 495 (1937)), the Commission awarded reparations on the basis of evidence relating to only one of the factors used in the construction of the combination rate. The shipper argued, as Sterling did here, that the overall through rate was necessarily unlawful to the same extent as the unlawful factor. The railroads, relying on *Great Northern*, argued that a combination through rate could never be shown to be unlawful by means of evidence directed only to one factor. The Commission, in *Auburn*, set forth the railroads' contention as follows:

> Defendants urge that complainants, by confining their evidence largely to the factors from the gateways, have failed to show the combinations unreasonable. They cite *Great Northern Ry. Co.* v. *Sullivan*, 294 U.S. 458, . . . [222 I.C.C. at 496].

[3] The Commission itself had answered this question in the affirmative in a case decided shortly before the *Great Northern* decision. *Alabama Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 204 I.C.C. 195 (1934), *aff'd in pertinent part and modified in other respects*, 213 I.C.C. 226 (1935). However, the Commission did not discuss this case in its opinion here.

In *Auburn*, the Commission rejected this misplaced reliance on *Great Northern* and awarded reparations.[4]

In a second case (*United States* v. *Beaumont S. L. & W. Ry. Co.*, 301 I.C.C. 231 (1957)), the Commission, apparently unaware of its decision in *Auburn*, adopted the reading of *Great Northern* which it had rejected in *Auburn;* namely, that evidence relating to one factor can never establish the illegality of an overall through rate. It was this interpretation of *Great Northern* which the Commission adopted in the instant case (again without citing *Auburn*).

The district court held that the Commission's ruling was based on "too simplistic an interpretation of *Great Northern*. . ." (App. 4a). The district court stated:

> "The Supreme Court [in *Great Northern*] held that the shipper could not recover damages without showing that the overall combination through rate was unreasonable. Upon the state of the record before the court, it was assumed that the overall rate was, indeed, reasonable.
>
> "The unreasonable American proportional did not result in economic injury to the shipper because

[4] In *Auburn*, the Commission stated:

> In *Great Northern R. Co.* v. *Sullivan, supra*, the Supreme Court held that an award of reparation based on a finding by the Commission that a proportional rate for that part of the transportation from the international border to destination was unjust and unreasonable cannot be sustained in the absence of a claim or finding that the through rate was unreasonable. Only the proportional rate from the international border was there assailed. *The court pointed out that complainants did not attack the combination*, or the Canadian Pacific proportional applying up to the border as a part of the through charge. It held that, there being *no claim or finding* to the contrary, the through charges collected on the shipments must be deemed to have been just and reasonable. [emphasis supplied] [222 I.C.C. at 497].

> he made his shipments upon charges which were reasonable in their totality. As we read the *Great Northern* decision, it is simply a recognition of the general principle of law that damages are not recoverable without injury" [App. 3a].

But, clearly, *Great Northern* did not hold that evidence relating to one factor could *never* establish the illegality of an overall through rate. That holding could not have been made in *Great Northern* because the plaintiff did not even allege that the overall through rate was unreasonable. For that reason, the district court here found it unnecessary to undertake a definitive interpretation of *Great Northern* (App. 4a). It decided only that *Great Northern* was inapplicable.

The district court's conclusion that in this case the illegality of the combination rate has been proved by the illegality of the western factor is unassailable. Here, the unlawful grouping of origins on the Chicago rate necessarily carried over into the combination rate. Unlike the situation in *Great Northern,* a depressed eastern factor could not make up for the excess charged on the western factor, for the railroads obviously did not and could not charge Sterling and its more distant competitors a different rate on the portion of the journey from Chicago to the east coast destination. The railroads had to charge the same on the eastern factor regardless of whether a shipment originated in Sterling or Denver. That being so, the overall combination rate grouped origins unlawfully to the same extent as the western factor. As the district court stated with unassailable logic:

> "To decide this dispute, we need not attempt any definitive interpretation of *Great Northern*. The record before us shows that the plaintiff did sustain economic injury on all of its shipments to the east, regardless of the points of termination. The injury results from the fact that in being required to pay the same rate charges as its competitors located in Greeley, Denver and Pueblo, the plaintiff was denied any opportunity to use its geographic location as a component in its competitive pricing structure. The record shows that meat is sold by quoted prices in the markets with the shippers absorbing transportation costs.
>
> "What is most significant here is that this is a case of relative unreasonableness. The Sterling to Chicago factor is unreasonable in the relationship between the rates thus required to be paid from Sterling and that same charge being made for the other shipping points in the group. What is unreasonable is to ignore the geographic differences. *That same relationship applies to any shipment going east of Sterling whether the shipment ends in Chicago or any place east of Chicago.* The difference between the plaintiff and the shippers from the other locations is exactly the same. Accordingly, our conclusion is that the denial of the reparations claimed by Sterling Colorado Beef on shipments to points east of Chicago is an error of law by the Commission and must be reversed with a remand to reconsider that claim in light of the views expressed herein" (App. 4a-5a) (emphasis supplied).

There is no merit to the railroads' contention that the district court's ruling "is squarely at odds with over sixty years of consistent interpretation of the interstate Commerce Act by the Commission regarding the evidentiary standard necessary to support reparation awards" (Jurisdictional Statement, p. 8). Little need be said beyond citing the *Auburn* case and pointing out that in denying reparations in *Great Northern,*

this Court *reversed* the Commission.[5] Other cases in which the Commission has found a combination rate unreasonable—and awarded reparations—on the basis of evidence directed toward only one factor are *C. W. Zaring & Co.* v. *Florida East Coast Railway Co.*, 153 I.C.C. 647 (1929), *Alabama Grocery Co.* v. *Atchison, T & S. F. Ry. Co.*, 204 I.C.C. 195 (1934), *aff'd in pertinent part and modified in other respects*, 213 I.C.C. 226 (1935), and *Marblehead Lime Co.* v. *St. Louis—S.F. Ry. Co.*, 253 I.C.C. 67 (1942). Indeed, aside from Commission cases which misinterpret *Great Northern*, prior Commission decisions support the district court's ruling.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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[5] Appellants have mis-cited the cases contained in footnote 7 of the Jurisdictional Statement. *C. W. Zaring & Co.* v. *Florida East Coast Railway Co.*, 153 I.C.C. 647 (1929), actually supports Sterling's position, for there the Commission awarded reparations after finding a combination rate unreasonable based on evidence directed toward one factor. In *Cairo Board of Trade* v. *C.C.C. & St. L. Ry. Co.*, 46 I.C.C. 343 (1917) and in *Fraser-Smith* v. *Grand Trunk Western Ry. Co.*, 185 I.C.C. 57 (1932), the Commission merely held that before reparation may be awarded for combination rate shipments, the total rate must be assailed. Like *Great Northern*, these cases made no ruling as to whether evidence directed to one factor may prove a combination rate unlawful.